(17,292.)

United States Supreme Court.

No. 206.

AUGUST J. HENKLE,

Plaintiff in Error,

v.

THE CITY OF CINCINNATI, A Municipal Corporation, et al.,

Defendants in Error.

BRIEF OF PLAINTIFF IN ERROR.

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STATEMENT OF THE CASE.

On December 31st, 1889, August J. Henkel, the plaintiff in error, was the owner in fee simple of a lot of land in the city of Cincinnati, Ohio, commencing at a point in the northwest corner of Molitor and Bishop streets, and thence running west along the north line of Molitor street two hundred and twenty-eight and seventy-two hundredths (228.72) feet to the west line of Corry's tract, which west line is the east line of Burnet Woods park, and thence north and with the east line of Burnet Woods park one hundred (100) feet, thence east and parallel with Molitor street two hundred and twenty-eight and seventy-two hundredths (22 8.72) feet, thence south on a line parallel with the east line of Burnet Woods park one hundred (100) feet to the place of beginning, so that plaintiff in error's west line was the east line of said Burnet Woods park.

Hopson street lies along the east line of said Burnet Woods park, is thirty (30) feet in width, and on said 31st day of December, 1889, extended south from Rochelle street, formerly known as Wayne street, to the said lands of plaintiff in error.

The city of Cincinnati, by its council and board of administration, on the 31st day of December, 1889, passed an ordinance declaring its intention to condemn and appropriate to public use for street purposes and for the purpose of opening Hopson street to Molitor street, a strip of ground thirty (30)

feet wide off of the west end of plaintiff in error's said lands; and this case arises out of the condemnation of said strip of ground as aforesaid.

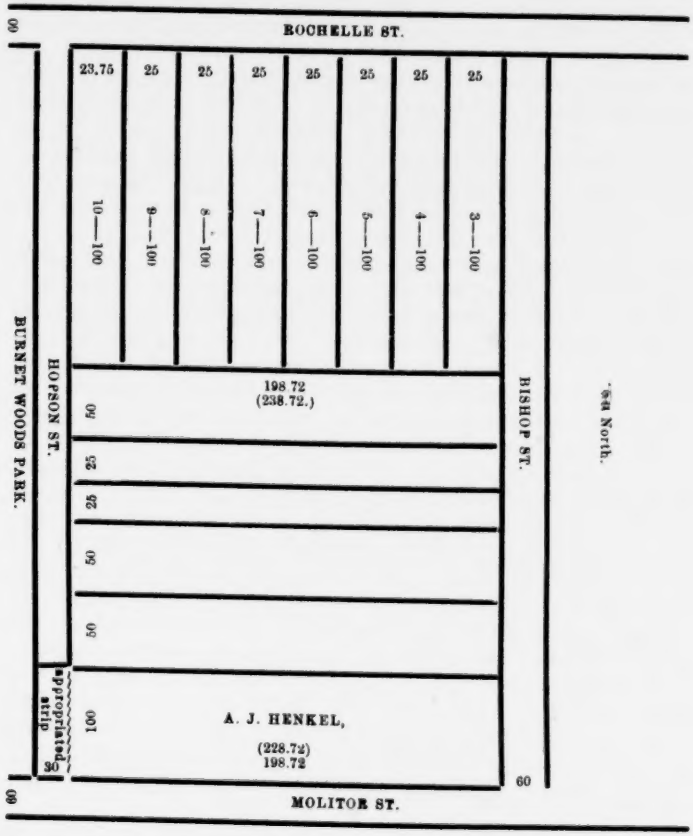
By said ordinance, (see exhibit "A", page 8, of the record) the said city authorized the necessary proceedings to be had for an inquiry and assessment of the compensation to be paid for said strip of ground, and declared that the compensation so found, together with all costs and expenses of said appropriation and the interest on bonds issued, should be assessed per front foot upon the lots and lands bounding and abutting upon said strip of ground so to be condemned as aforesaid, the said lots and lands being declared by said ordinance to be the lots and lands which would be specially benefited by said appropriation, according to the laws and ordinances on the subject of assessments; the assessments therefor to be payable in ten annual installments, the same to be collected as provided by law and the assessing ordinance thereafter to be passed. And that bonds should be issued in anticipation of such assessment.

On the 3d day of February, 1890, the said city commenced proceedings in the probate court of Hamilton county, Ohio, against plaintiff in error, under the statute, to assess compensation for said strip of ground and in which proceedings on April 11th, 1890, the same was condemned for street purposes as aforesaid and compensation therefor was assessed by the jury at forty (40) dollars per front foot, making the sum of twelve hundred dollars ($1,200.00); which assessment of compensation was made "irrespective of any benefit to the plaintiff in error from any improvement proposed by said corporation." On January 21st, 1891, the amount of said verdict was paid to plaintiff in error and possession of said premises given. The costs of said proceedings amounted to two hundred and fifty-seven and eighty hundredths ($257.80) dollars.

On September 21st, 1892, said city found that the total costs of said strip of ground so appropriated aggregated one thousand, four hundred and fifty-seven and eighty hundredths dollars ($1,457.80), and by its board of administration passed an assessing ordinance (see exhibit "B", page 9, of the Record), whereby it was ordained that two per cent of said amount should be and was recognized as the said city's portion of said total costs, and one-half of the balance, namely seven hundred and fourteen and thirty-three hundredths ($714.33) dollars was levied and assessed by the front foot upon the remainder of plaintiff in error's said lands bounding and abutting on Hopson street, in ten annual installments, bearing five per cent. interest, payable annually, and the other half charged against the lands of said city, namely, Burnet Woods park, abutting

upon said strip of ground so appropriated as aforesaid. And that plaintiff in error should pay the said amount of money by him due, in that behalf, to the city auditor, on or before the 20th day following the day of the final approval of said ordinance, in each of the several years, and in default of such payment, the city auditor should forthwith certify all unpaid assessments to the county auditor, to be by him placed upon the tax duplicate and collected according to law. Thus the property of the plaintiff in error from which said strip of ground appropriated was taken, is the only private frontage sought to be assessed, the said Burnet Woods park being the property of the said city of Cincinnati.

For convenient reference, a plat of the property on Hopson street and including the property of plaintiff in error, is shown as follows:



This action was brought by plaintiff in error originally in the common pleas court of Hamilton county, Ohio, to obtain a decree restraining the defendant in error, the city of Cincinnati, Ohio, a municipal corporation, from enforcing the assessment ordained by said assessment ordinance, against the remainder of his lands not taken in said appropriation bounding and abutting on said strip so taken.

Plaintiff in error claimed and relied upon the invalidity of said assessment ordinance, whereby said city charged and imposed upon the remainder of his said lands abutting upon the portion so appropriated one-half of the entire amount allowed him by the jury for his lands taken and one-half of the entire costs and expenses incurred by said city in obtaining title to said lands appropriated, on the ground that said assessment ordinance and said assessment and charge upon the remainder of his said lands are in conflict with, repugnant to and in violation of, section one (1), of the fourteenth amendment to the constitution of the United States, which provides: That no state shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction, the equal protection of the laws.

A temporary restraining order was allowed as prayed for by said common pleas court, and on final hearing, the same was dissolved and the petition dismissed. Appeal was taken to the circuit court of said Hamilton county, Ohio, where a like decree was rendered, dissolving said injunction and dismissing the petition. Error was thereupon prosecuted from said circuit court to the supreme court of Ohio, where the judgment of said circuit court was affirmed. Whereupon plaintiff in error removed said case from said supreme court of Ohio, the same being the highest court of law or equity in said state in which a decision could be had in said case, to the supreme court of the United States, under the twenty-fifth section of the judiciary act of 1789, which provides that a final judgment or decree in any suit in the highest court of a state, in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision was against their validity; or wherein is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege, or immunity is claimed under the constitution, or any treaty or statute of, or commission held or authority exercised under the United States, and the decision is against the title, right, privilege,

or immunity specially set up or claimed, by either party, under such constitution, treaty, statute, commission, or authority, may be re-examined and reversed or affirmed in the supreme court of the United States upon a writ of error.

SPECIFICATION OF ERRORS.

In the supreme court of Ohio on the final hearing of this case, the plaintiff in error specially set up and claimed that the said assessment upon remainder of his said property bounding and abutting upon the said strip of ground appropriated, as ordained by said assessment ordinance, was made without regard to the benefits which it conferred upon the property of plaintiff in error, (see subdivision 5, of page 3, of the Record) and that said assessment ordinance and said assessment were in violation of the fourteenth amendment to the constitution of the United States, that no state shall deprive any person of his property without due process of law; and that said supreme court of Ohio, on said final hearing against the said claim and contention of plaintiff in error, declared that said assessment ordinance and said assessment were not in violation of said fourteenth amendment to the constitution of the United States. (See journal entry of January 6th, 1899, in said court, on pages 17 and 18 of the Record.)

Said supreme court of Ohio erred in so holding and deciding that said assessment ordinance and said assessment were not in violation of said fourteenth amendment, against the said claim and contention of the plaintiff in error, and in affirming the judgment of the circuit court of Hamilton county, Ohio.

ARGUMENT.

It is well settled that the due process of law prescribed by the fourteenth amendment of the constitution of the United States requires compensation to be made or secured to the owner of private property when the same is taken by a state, or by the authority of a state, for public use.

Chicago, B. & Q. R. Co. v. City of Chicago, 166 U. S., 226, 241; 17 Sup. Ct., 581.

Long Island Water Supply Co. v. City of Brooklin, 166 U. S., 685, 695; 17 Sup. Ct., 718.

Said assessment ordinance and said assessment are based upon section 2271, of the Revised Statutes of Ohio, which is as follows: "In cities of the first grade of the first class, and

in corporations in counties containing a city of the first grade of the first class, the tax or assessment especially levied or assessed upon any lot or land for any improvement, shall not except as provided in section 2272, exceed twenty-five per centum of the value of such lot or land after the improvement is made, and the costs exceeding that per centum shall be paid by the corporation out of its general revenue; * * * and whenever any street or avenue is opened, extended, straightened, or widened, the special assessment for the cost and expense, or any part thereof, shall be assessed only on the lots and lands bounding and abutting on such part or parts of said street or avenue so improved, and shall include of such lots and lands only to a fair average depth of lots in the neighborhood, but shall also include other lots and parts thereof and lands to such depth; and whenever at least one-half in width of any street or avenue has been dedicated for such purpose from the lots and lands lying on one side of the line of such street or avenue, and such street or avenue is widened by taking from lots and lands on the other side thereof, no part of the cost and expense thus increased (incurred) shall be assessed upon the lots and lands lying on said first-mentioned side, but only upon the other side, and as aforesaid, but said special assessment shall not be in any case in excess of benefits."

This statute and said assessment ordinance founded upon it authorized a special assessment upon the property bounding and abutting upon the strip appropriated by the front foot for the entire cost and expense of the appropriation and improvement without taking special benefits into account. The city of Cincinnati by its council declared by its ordinance of December 31st, 1889, that the lots and lands bounding and abutting upon the strip of ground to be appropriated were the lands which would be specially benefited by said appropriation and should therefore be assessed with the entire cost thereof, and it is plain and manifest that the said city proceeded upon the theory that the abutting property could be made to bear the whole cost of the improvement, whether such property was benefited or not to the extent of such cost.

Village of Norwood v. Baker, decided by the Supreme Court, of the United States, December 12th, 1898.

In the Norwood case, Baker owned on both sides of the proposed street to be opened, and the entire amount allowed by the jury and the entire cost and expense of the appropriation were assessed back upon the remainder of Baker's property by the front foot, that is, one-half of said entire cost and expense of the appropriation upon each side of the proposed

street. In this case, Henkel owned upon but one side of the proposed street to be opened, and the city of Cincinnati assessed back upon his said property by the front foot one-half of the entire cost and expense of the appropriation. The jury allowed him twelve hundred dollars compensation for his property taken. The city of Cincinnati assessed back upon his said frontage $714.33, so that he actually received for his property taken, $485.67. His property from which the appropriation was taken, had a frontage of 228.72 feet on Molitor street, and after the appropriation 198.72 feet, with 100 feet depth, also a frontage upon Bishop street. The very position of the lots north of plaintiff in error's property fronting upon Hopson street, shows them to be far more benefited by the opening of Hopson street than plaintiff in error's property, yet plaintiff in error's property is the only private frontage assessed, and as in the Norwood-Baker case, is made to bear one-half of the entire burden of the appropriation. The assessment of the other half upon Burnet Woods park was virtually an assessment or tax upon the entire city of Cincinnati, as said park was the property of said city. If Henkel had owned upon both sides of the strip appropriated as in the Norwood-Baker case, under the system of assessment here adopted, the entire cost and expense of the appropriation would have fallen upon his property. This assessment and the principles involved in it are therefore exactly the same as in the Norwood-Baker case.

The plaintiff in error claims that the burden imposed upon the remainder of his property by the defendant in error, the city of Cincinnati, is unjust, illegal, and wholly void under the principles of law laid down in the Norwood-Baker case as follows:

"The only just basis upon which special assessments for public improvements can rest, is that of special benefits to the property taxed; and the exaction from the owner of private property of the cost of such an improvement, in substantial excess of the special benefits accruing to him, is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation.

"Where a special assessment is in itself illegal, because it rests upon a basis that excludes any consideration of benefits to the property taxed, proof that it is in excess of benefits is not required, in a suit to enjoin its enforcement, as the only appropriate decree in such case is one enjoining the whole assessment, leaving the local authorities to make a new one according to law.

"Nor is such suit controlled by the general principle that

a plaintiff must tender or offer to pay what its legally due, before he can obtain relief in equity against an excessive tax, the entire assessment being illegal.

"Proceedings under a state statute, by which ground for a street was condemned through plaintff's property, the damages awarded were paid, and the amount of such damages, together with all the costs and expenses of the condemnation, were assessed back on the remaining property of plaintiff, lying on either side of the street, without inquiry as to sepecial benefits, constituted a taking of plaintiff's property for public use without compensation, to the extent of the excess of the cost of opening the street over the benefits."

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